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UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

Argued June 1, 1973

July 17, 1973

Before

Hon. WIN G. KNOCH, *Senior Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. JOHN PAUL STEVENS, *Circuit Judge*

RICHARD K. LEAS, *Plaintiff-Appellant,*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
vs.	
No. 72-1615	No. IP 70 C 715
KENNETH E. SHERER, *Defendant-Appellee.*	James E. Noland, Judge.

ORDER

The plaintiff-appellant, Richard K. Leas, has appealed from a decision of the District Court granting motion for summary judgment in favor of the defendant on the ground that plaintiff's action for malpractice, filed December 14, 1970, is barred by the Indiana Statute of Limitations, Burns Indiana Statutes, §2-627, which provides:

> MALPRACTICE—Limitation of actions.—No action of any kind for damages, whether brought in

> contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of.

Plaintiff argues that as applied to his case this statute is unconstitutional because the incident giving rise to his action occurred on September 7, 1966, but was not discovered until December 15, 1968, when a hemostat which had been left in his abdomen during surgery performed by defendant-appellee Kenneth E. Sherer was removed by another surgeon.

The impact of this harsh statute has been somewhat lessened in cases where there has been fraudulent concealment of the wrong in a particular specified manner. See *Guy v. Schuldt* 1956, 236 Ind. 101, 109, 138 NE2d 891, 895, where because of the fiduciary relationship between the physician and his patient, fraudulent concealment was presumed while the relationship continued.

Plaintiff seeks to bring his case within this narrow exception. He sees a contested issue of fact as to whether the relationship between him and the defendant did not continue so as to bring the filing of this action within the two year period of the cessation of that relationship. Plaintiff argues here that the defendant had a continuing duty to remove the hemostat and that the statute did not begin to run until it was actually removed by another surgeon, or, as contended below, after plaintiff was again examined by defendant on December 22, 1968. Defendant had not seen the plaintiff since his leaving the hospital after the initial surgery on November 8, 1966.

The District Court held, and we agree, that the relationship as a matter of law had terminated. Plaintiff had never visited the defendant prior to the operation and after the post operative visits did not return. When trouble arose, he consulted another physician. The District Court properly held that the clear meaning of the statute could not

be frustrated by merely returning for a visit at a much later date.

Plaintiff argues that the trend is toward tolling statutes of limitations until the cause of the action is discovered or should have been discovered, citing cases to support that view. We must, however, apply the law of the State of Indiana, *Erie R. Co. v. Tompkins*, 1938, 304 U.S. 64.

Even if theirs is the minority rule at the present time, the statute has been construed by Indiana Courts and has been construed strictly. See *Guy V. Schuldt*, supra; *Ostojic v. Brueckman*, 7 Cir., 1968, 405 F. 2d 302; *Blank v. Community Hospital*, 1968, 143 Ind. App. 333, 337, 240 NE2d 562, 564, rehrg. den., *Chaffin v. Nicosia*, June 27, 1973, —— Ind. App. ——, 297 WE(2) 904.

Indiana is not alone in applying a strict construction to statutes of this type and resolving the charge of unconstitutionality adversely to plaintiff. Similar language in Missouri's malpractice statute, Mo. Rev. Stat. §516.140, 1959, has been similarly applied in *Laughlin v. Forgrave*, 1968, Supreme Court of Missouri, sitting en banc, 432 S.W. 2d 308, 314, rehrg. den., despite the fact that the plaintiff there could not have known of the foreign object left in her lower back during surgery until later surgery, after the statute had run, disclosed its presence. Similar holdings occurred in *Reistad v. Manz*, 1960, 11 Wis. 2d 155, 159, 105 NW 2d 324, 325-6 where the statute required that written notice be served on malpractice defendants within two years of the event causing damage, and in *Clark v. Gulesian*, 1 Cir., 1970, 429 F. 2d 405, 406, cert. den., 1971, 400 U.S. 993, dealing with a Maine statute. The First Circuit noted that although state courts differed in their approach to the question of when the cause of action accrued, no majority opinion based its decision on constitutional grounds, and pointed out that this was a policy question for the legislature which might reasonably recognize that a defendant has an interest in repose and avoidance of stale claims, however free from fault might be the plaintiff's delay.

The decision of the District Court is affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

August 21, 1973

Before

Hon. WIN G. KNOCH, *Senior Circuit Judge*

Hon. ROGER J. KILEY, *Circuit Judge*

Hon. JOHN PAUL STEVENS, *Circuit Judge*

RICHARD K. LEAS,	)	Appeal from the United
	)	States District Court for
Plaintiff-Appellant,	)	the Southern District of
	)	Indiana, Indianapolis Di-
vs.	)	vision.
	)	
No. 72-1615	)	No. IP 70 C 715
	)	
KENNETH E. SHERER, M.D.,	)	
	)	
Defendant-Appellee.	)	

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

(Sixty days up October 20. Pet. to transfer.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

RICHARD K. LEAS,	)	
	)	
vs.	)	IP 70 C 715
	)	
KENNETH E. SHERER, M.D., and REID MEMORIAL HOSPITAL, INC.	)	

ORDER

The above entitled cause is before the Court upon defendant Sherer's Motion for Summary Judgment. Whereupon the Court, now being duly advised in the premises, hereby makes the following rulings:

1. Defendant Sherer's motion for summary judgment is GRANTED.

2. Defendant Sherer is DISMISSED from this cause.

IT IS ORDERED that said rulings be entered accordingly.

DATED this 24th day of May, 1972.

/s/ JAMES E. NOLAND

JAMES E. NOLAND,
U. S. DISTRICT JUDGE

MEMORANDUM OPINION

This is a medical malpractice case in which the defendant Sherer has raised the statute of limitations as a bar to recovery. The relevant dates are the following: (1) plaintiff underwent surgery to remove his spleen on Sep-

tember 7, 1966, the surgery being performed by defendants; (2) post-surgery observation was concluded November 8, 1966; (3) plaintiff underwent surgery in Tennessee on December 15, 1968, wherein a hemostat was discovered and removed from his body; (4) plaintiff again consulted with defendant Sherer on December 22, 1968, concerning his recovery; (5) plaintiff filed this action on December 14, 1970. The problem presented here is a determination of when the statute of limitations began to run; defendant argues that the statute began running at (1) or (2) while plaintiff asserts that it began running at (3).

Defendant's motion is based upon Burns Indiana Statutes, §2-627:

> "Malpractice—Limitation of action—No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced, or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of."

As this statute has been strictly construed in *Guy v. Schuldt,* 138 NE2d 891 (1956) and *Ostojic v. Brueckman,* 405 F. 2d 302 (7th Cir., 1968), defendant feels he is entitled to summary judgment. This Court agrees.

Plaintiff makes three arguments in opposition to defendant's motion: (1) the problem of whether plaintiff's final visit to defendant's office represented a continuation of the physician-patient relationship is a material question of fact which must be decided by the jury; (2) the strict interpretation of the statute as per *Guy* and *Ostojic* is no longer the law of this state in view of the recent trend toward the "discovery" rule; (3) any statute of limitations not based upon the "discovery" rule or other standard which operates in a similar vein violates Article I, §12 of the Indiana Constitution. The Court will briefly address itself to each of these arguments.

Plaintiff's first argument is based upon the sole exception to §2-627 that was carved out by the Supreme Court in *Guy v. Schuldt.* Where a doctor continues the physician-patient relationship and conceals his wrongdoing, the Court will find a continuing duty of disclosure which tolls the running of the statute of limitations. The duty of disclosure ends when the physician-patient relationship ends, the signal for the statute to begin running. Plaintiff contends that his late visit to the doctor could be construed as evidence of a continuing relationship; this Court holds that, as a matter of law, it could not. Plaintiff had never visited this doctor before his operation and it is clear that he did not consider the relationship to be continuing; following his post-operative visits, he did not visit the doctor again. When further trouble arose, plaintiff visited another doctor. Likewise, this Court rejects plaintiff's argument on policy grounds. It is not for the courts to frustrate or subvert a legislative mandate by allowing a patient to reopen his statute of limitations by merely returning to the doctor for a short visit at a much later date. It was the clear intent of the parties that the transaction entered into in 1966 was completed.

Plaintiff's second argument is that the Indiana interpretation of its malpractice statute of limitations is both outmoded and out of step with the law. According to *Guy v. Schuldt*, supra, a plaintiff could lose his right to sue without his ever knowing it existed where the symptoms of malpractice took more than two years to surface and be diagnosed. At the time *Guy* was decided, it was in step with the majority of jurisdictions. The minority rule, the law in four states in 1956, is the so-called "discovery" rule where the statute does not start running until the patient discovers or should have discovered the negligence. Plaintiff adroitly points out that twenty-two states have adopted the discovery rule since 1960; plaintiff cites the states and cases. Plaintiff's argument must fail on this point also, however. This argument has been attempted within recent years in *Ostojic v. Brueckman,* supra, and

Blank v. Community Hospital, 240 NE2d 562 (1968), cases which have recently supported the *Guy* position as expounded by now Chief Justice Arterburn. The cases cited by plaintiff show a trend in the law with which Indiana is out of step; all of the cases cited by plaintiff are state Supreme Court cases, however, not rulings by federal courts. It is the duty of the federal courts to apply the law as it is handed down from the states; any change as basic as that proposed by plaintiff should come from the state court system, not from the federal courts where it would be unreviewable. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S. Ct. 817 (1938).

Plaintiff's third contention is that the *Guy* position violates Article I, §12 of the Indiana Constitution which holds that the courts shall be open to every man for redress. This argument is but an extension of the "discovery" rule argument and suffers many of its informities. The Indiana Supreme Court has implicitly rejected this position; it is not for this Court to change state law.

Cases decided upon the statute of limitations often seem unjust. The Indiana General Assembly has determined, however, that justice can be done only when causes are filed within a specified time. It is the duty of this Court to uphold this mandate.

/s/ JAMES E. NOLAND

JAMES E. NOLAND,
U. S. DISTRICT JUDGE

DATE: May 24, 1972

OPPOSITION BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-709

RICHARD K. LEAS,

Petitioner,

v.

KENNETH E. SHERER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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IN THE

Supreme Court of the United States

TERM, 1973

NO. 73-790

RICHARD K. LEAS,

Petitioner,

v.

KENNETH E. SHERER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit and of the United States District Court for the Southern District of Indiana, Indianapolis Divi-

sion, are not officially reported, but are appended to the Petition for Writ of Certiorari and appear in the appendix hereto.

JURISDICTION

Respondent does not question the jurisdiction as set forth in the Petition.

QUESTIONS PRESENTED

Does the Acts of the Indiana General Assembly 1941 Ch. 116 § 1 p. 328, Burns Ind. Statutes VOL. 2, (1967 Replacement) § 2-627, which provides that an action for damages based upon professional servicss rendered shall be brought within two (2) years from the date of the act or neglect complained of violate Petitioner's 14th Amendment right of hearing or trial when Petitioner had not discovered the act or neglect complained of prior to expiration of the period of limitation and his cause of action was consequently barred?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitution of the United States Amendment 14 Section 1:

> "Citizenship—Due process of law—Equal protection.
>
> • • •
>
> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without the process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Acts of the General Assembly 1941 Ch. 116, § 1 p. 328 Burns Ind. Statutes VOL. 2 (1967 Replacement) § 2-627.

> "Malpractice—Limitation of actions.—No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of."

STATEMENT OF THE CASE

Respondent, Kenneth E. Sherer, a duly licensed physician in the State of Indiana performed a surgical operation known as a "splenectomy" on Petitioner on September 7, 1966, in Richmond, Indiana. Petitioner's treating physician called in Respondent to remove the Petitioner's spleen which had been ruptured as a result of an automobile accident on August 31, 1966. Respondent had never treated Petitioner professionally prior to September 7, 1966. It was during the course of this operation that Petitioner alleges that Respondent left one of the surgical instruments, a hemostat, in Petitioner's abdomen. Respondent continued the post operative treatment until November 8, 1966, at which time Petitioner was discharged from the hospital.

On December 15, 1968, Petitioner underwent a surgical operation for the removal of a hemostat from his abdominal cavity performed by a Dr. Nelson Rue in Bowling Green, Kentucky. Between November 8, 1966 and December 15, 1968, Respondent never treated Petitioner professionally.

On December 14, 1970, Petitioner filed this malpractice action based upon professional medical services rendered in the September 7, 1966 splenectomy. On August 12, 1971, Respondent filed a Motion for Summary Judgment based upon the expiration of the applicable limitations on actions which the District Court granted on May 24, 1972. The United States Court of Appeals for the Seventh Circuit affirmed the District Court on July 17, 1973, petition for rehearing denied August 21, 1973.

ARGUMENT

Petitioner asserts as the basis of his request for a writ of certiorari the reason that: "The United States Court of Appeals has decided an important question of Federal Constitutional Law in a way in conflict with applicable Decisions of this Court." The only decision cited in Mr. Leas' Petition is that of *Fuentes v. Shevin,* (1972), 407 U.S. 67, 32 Law. Ed. 2d 556, 92 Supreme Ct. 1983, and therefore it must be assumed that this is the decision of the Court Petitioner asserts is in conflict with the decision of the Seventh Circuit in the present matter. Respondent respectfully submits that there is absolutely no conflict between the decision of the Seventh Circuit in the present matter and the decision the Court made in *Fuentes v. Shevin* (supra). In Mr. Justice Stewart's words *Fuentes v. Shevin* held the following:

> "We hold that the Florida and Pennsylvania prejudgment replevin provisions work a deprivation of property without due process of law insofar as they deny the rights to a prior opportunity to be heard before chattels are taken from their possessor. Our holding, however, is a narrow one. We do not question the power of a State to seize goods before a final judgment in order to protect the security interests of creditors so long as those creditors have tested their claim to the goods through the process of a fair prior hearing. The nature and form of such prior hearings, moreover, are legitimately open to many potential variations and are a subject, at this point, for legislation —not adjudication." (supra) p. 96.

The case at bar deals with an entirely different matter and related neither in fact nor principal.

The present suit is concerned with Indiana's Statute of Limitations pertaining to Acts of Malpractice, 1941 Acts of the General Assembly Ch. 116 § 1 p. 328 Burns Ind. Statutes VOL. 2 (1967 Replacement) which provides:

> "Malpractice—Limitation of actions. —No action of any kind for damages, whether brought in contract or tort, based upon professional services rendered or which should have been rendered, shall be brought, commenced or maintained, in any of the courts of this state against physicians, dentists, surgeons, hospitals, sanitariums, or others, unless said action is filed within two (2) years from the date of the act, omission or neglect complained of."

This statute has been strictly construed by the Courts of Indiana and allows but a single exception to its strict application, namely, that while the doctor patient relationship continues fraudulent concealment is presumed on the part of the physician and the statute is tolled until the termination of the fiduciary relationship. *Guy v. Schuldt,* (1956), 236 Ind. 101, 138 N.E. 2d 891. *Ostojic v. Brueckman,* 405 F. 2d 302 (7th Cir. 1968). *Blank v. Community Hospital,* (1968), 143 Ind. App. 333, 240 N.E. 2d 562. rehrg. den. *Chaffin v. Nicosia,* June 27, 1973, —— Ind. App. —— 297 N.E. 2d 904.

Petitioner maintains that this statute as construed by the Courts of Indiana is unconstitutional because it denies him a remedy in due course of law as guaranteed by Section 1 of the 14th Amendment of the Constitution of the United States. Petitioner alleges that the statute outlawed his cause of action before he could have known of the presence of the hemostat in his abdomen, which was the basis of his suit. This is obviously a misstatement. If, as Petitioner alleges, the hemostat was left in his abdomen in the operation of September 7, 1966, it remained there until discovered

and removed in December of 1968. During that two year period it was there and could have been discovered. Whether in fact it was discovered is an entirely different question. The fact nevertheless remains that Petitioner *could* have learned of the hemostat's presence at anytime during the two year period of limitations.

Over the many years of the Courts' existence, it has analyzed, defined, discussed and decided questions concerning numerous statutes of limitations. It has been called upon and decided on many occasions whether a certain statute of limitations violated the due process clause of the 14th Amendment. In *Chase Securities Corp. v. Donaldson,* (1945), 325 U.S. 304, 314, 89 Led. 1628, 1635, 65 S Ct. 1137 Mr. Justice Jackson stated the following on behalf of the Court concerning statutes of limitations:

> "Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. . . . They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation . . . They represent a public policy about the privilege to litigate." (Citations omitted).

The Court has held that statutes of limitations in and of themselves do not deprive a litigant of due process, but that the period prescribed within which the action must be brought must be reasonable under the circumstances. *Wilson v. Iseminger,* (1901), 185 U.S. 55, 46 L. Ed 904, 22 S Ct. 573; *Mattson v. Department of Labor,* (1934), 293

U.S. 151, 79 L. Ed 251 55 S Ct. 14. In determining what is a reasonable time the Court has said:

> ". . . what shall be considered a reasonable time must be settled by the judgment of the legislature, and the courts will not inquire into the wisdom of its decision in establishing the period of legal bar unless the time allowed is manifestly so insufficient that the statute becomes a denial of justice." *Wilson v. Isinger* (supra) 62, 63.

The Indiana General Assembly has allowed two years after the cause of action accrues for prospective litigants to seek judicial redress in cases of medical malpractice. This period is certainly not unreasonable. The fact that petitioner was ignorant of the facts out of which his cause of action arose for over two years is unfortunate, but nevertheless it has long been held by numerous authorities that this fact does not delay, alter or prevent the running of the statute of limitations or postpone the commencement of the period of limitation until he discovers the facts. *Harper v. Harper,* 252 F. 39 (4th Cir. 1918); *Aachen & Monich Fire Ins. Co. v. Morton,* 456 F. 654, (6th Cir. 1907); *Clark v. Gulesian,* 429 F. 2d 405 (1st Cir. 1970) Cert. denied 400 U.S. 993 (1971). As stated by the Supreme Court of Ohio in *State v. Industrial Commission of Ohio,* 130 Ohio St. 77, 196 N.E. 780 (1935):

> "Though a person may not discover his injury until too late to take advantage of the appropriate remedy yet this is said to be one of the occasional hardships necessarily incident to a law arbitrarily making legal remedies contingent on mere lapse of time."

The initiation of the statute of limitations at the time of the negligent act and not at the time of discovery of the negligence or the emergence of the injury is a principle approved and followed from the earliest days of American

jurisprudence, and one followed by the judiciary of England prior to this. *Wilcox v. Plummer,* (1830) 4 Pet 172 29 U.S. 172, 7 L ed 821; *Sheriffs of Norwich v. Bradshaw,* 20th Eliz. 1 Croke 53; *Battley v. Faulkner,* 3 B. & A. 288, 3 Eng. Com. Law Rep. 289; *Short v. McCarthy,* 3 Barn. & Ald. 626, 3 Eng. Com. Law Rep. 403; *Howell v. Young,* 5 B. & C. 254, 11 Eng. Com. Law Rep. 219. *Wilcox v. Plummer* (supra) and the majority of the English cases involved the analogous situation of attorney malpractice. In *Short v. McCarthy* (supra) it was held that the period of limitations had expired in spite of the fact that the plaintiff was ignorant of the attorney's neglect until after the expiration.

Respondent has been unable to find a decision where a statute of limitations of similar effect has been struck down as denying due process. Similar statutes as the one under consideration have come under the identical attack of denial of due process in various state Courts and have been upheld as constitutional. *Laughlin v. Forgrave,* Mo. App., 432 SW 2 308 (1958); *Reistad v. Manz,* 11 Wis (2) 155, 105 NW 2d 324 (1960). In addition, the United States Court of Appeals for the First Circuit in considering a case factually identical to the case at bar held that the State of Maine's medical malpractice statute, identical in effect to that of Indiana, did not violate the due process clause of the 14th Amendment and was constitutionally valid. *Clark v. Gulesian,* 429 F 2d 405, (1st Cir. 1970) cert. denied 400 U.S. 993 (1971).

In upholding the constitutionality of a statute of limitations concerning products liability, Chief Judge Frank W. Wilson, United States District Court, Eastern District Tennessee, fairly summarized the reasoning of constitutional validity of statutes of limitations similar in effect to the Indiana Statute before the Court, in similar factual situations as the case at bar as follows:

> "... the Court is of the opinion that legislation adopting the date of the wrongful act or the date of the sale of the defective product as the inception date for the running of a statute of limitations cannot be said to be so arbitrary or capricious as to fall under the ban of the Due Process Clause. A statute of limitations must be judged in the light of the broad class of cases to which it applies and if it is reasonable with respect to the class, it will not be judged unreasonable merely because it is deemed to operate harshly in a particular or exceptional instance ... In reaching this conclusion it should be emphasized that the role of the Court is not to pass upon the wisdom or lack of wisdom of the legislation involved. The courts do not sit to review the wisdom of legislation or regulation by public bodies, for these matters address themselves solely to the legislative or regulating body." (Citations omitted: *Hargraves v. Brackett Stripping Machine Company*, 317 F. Supp. 676, 683 (E.D. Tenn., 1970).

The "special and important reasons" (Rule 19 Rules of the Supreme Court of the United States) necessary before certiorari will be granted simply do not exist in the present matter before the Court. The precise issues presented by Petitioner in the present writ have been presented to the Court by the Petitioner in *Clark v. Gulesian* (supra) in which the Court denied certiorari, 400 U.S. 993 (1971). The issues are just as unworthy of a grant of certiorari now as they were in *Clark v. Gulesian* (supra).

CONCLUSION

For the reasons stated above, Respondent says that a Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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